Filed 1/31/19 In re E.T. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re E.T. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. LAURA B., Defendant and Appellant.	F077775 (Super. Ct. Nos. 18CEJ300021-1, 18CEJ300021-2) **OPINION**

THE COURT[*]

APPEAL from orders of the Superior Court of Fresno County. Brian M. Arax, Judge.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and DeSantos, J.

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INTRODUCTION

Appellant Laura B. is the mother of two girls, E.T. and N.T. A Welfare and Institutions Code,[1] section 300 petition was filed on behalf of the girls by the Fresno County Department of Children and Family Services (department). Father claimed Indian heritage, but the juvenile court found that the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.), did not apply.

Mother contends the juvenile court's ICWA finding is reversible error because four tribes were defectively noticed. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The only issue raised in this appeal is whether the department fully complied with the ICWA notice requirements. "Because compliance with the ICWA is the only issue raised in this appeal, our discussion of the facts and procedural background focuses on the facts relevant to compliance with the ICWA." (*In re I.B.* (2015) 239 Cal.App.4th 367, 370.)

On January 29, 2018,[2] a section 300 petition was filed on behalf of E.T. and N.T. An ICWA-010(A) form was included, which indicated the children may have Apache heritage. Father had signed an ICWA-020 form on January 29, stating he had Apache heritage. Mother signed an ICWA-020 form on February 14, stating she had no Indian heritage.

On April 5, the department filed an ICWA-030 form indicating possible Apache and Cherokee heritage on father's side. The form reflected notice of the proceedings was given to eight Apache tribes and three Cherokee tribes; notice was mailed on February 16.

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1 References to code sections are to the Welfare and Institutions Code,.

2 References to dates are to the year 2018.

On April 19, the department filed a motion to declare the ICWA inapplicable to the case. The motion stated that father reported Apache and Cherokee heritage and that the department had provided notice to the eight federally recognized Apache tribes and the three federally recognized Cherokee tribes. The motion also noted that the Bureau of Indian Affairs (BIA) previously notified the department it will not respond to ICWA notices because "the verification of enrollment is a tribal responsibility." As of the filing of the motion, the department had received responses from only five tribes, all stating the girls were not members of, or eligible for membership in, the tribes.

On May 25, the department filed responses from two more tribes, both indicating the girls were not members of or eligible for membership in the tribe.

A combined jurisdiction and disposition hearing was scheduled for June 28; mother was contesting jurisdiction. The ICWA motion also was to be heard on that date. The matters were continued to July 3.

At the continued hearing on July 3, the juvenile court granted the department's motion to declare ICWA inapplicable to the case. When asked by the juvenile court if there were any objections to granting the ICWA motion, no objection was raised.

July 3 also was the date of the continued jurisdiction and disposition hearing. The girls were ordered removed from mother's custody; they were to remain in out-of-home care. Reunification services were ordered for mother.

Mother filed a notice of appeal of the June 28 and July 3 orders.

DISCUSSION

The Supreme Court issued its decision in *In re Isaiah W.* (2016) 1 Cal.5th 1, 6, 15, holding that a parent can raise the issue of the ICWA compliance at any stage of the proceedings, including in an appeal.

To the extent we reference materials not included in the appellate record, we do so on our own motion pursuant to California Rules of Court, rules 8.252(a) and 8.410(b)(1).[3]

The ICWA

Congress enacted the ICWA to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children in foster or adoptive homes that will reflect the unique values of Indian culture. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) An " 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and … the biological child of a member of an Indian tribe ….' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) The ICWA applies only to federally recognized tribes. (25 U.S.C. § 1903(8); *In re Jonathon S.*, *supra*, at p. 338; *In re B.R.* (2009) 176 Cal.App.4th 773, 783; *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 166-168.)

In state court proceedings involving the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe have the right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c).) But this right is meaningless unless the tribe is notified of the proceedings. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466.) Notice serves the dual purpose of (1) enabling the tribe to investigate and determine whether a child is an Indian child; and (2) advising the tribe of the pending proceeding and its right to intervene. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.)

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3 References to rules are to the California Rules of Court.

In every dependency proceeding, the agency and the juvenile court have an "affirmative and continuing duty to inquire whether a child … is or may be an Indian child …." (rule 5.481(a); § 224.2, subd. (a); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 (*Gabriel G.*); *In re W.B.* (2012) 55 Cal.4th 30, 53.) Once the court or agency "knows or has reason to know that an Indian child is involved, the social worker … is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable …." (*Gabriel G.*, *supra*, at p. 1165; rule 5.481(a)(4).) The agency's duty of "further inquiry" requires " 'interviewing the parents, Indian custodian, and extended family members …, contacting the Bureau of Indian Affairs … [and contacting] the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.' " (*Gabriel G.*, *supra*, at p. 1165; rule 5.481(a)(4).)

The ICWA applies to children who are eligible to become or who are members of a tribe but does not limit the manner by which membership is to be defined. (*In re Jack C.* (2011) 192 Cal.App.4th 967, 978.) A "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32.) The tribe's determination that a child is a member of or eligible for membership in the tribe is conclusive. (§ 224.2, subd. (h).)

Standard of Review

Where, as here, the trial court has made a finding that the ICWA is inapplicable, the finding is reviewed under the substantial evidence standard. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179.) Thus, we must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we must indulge all legitimate inferences in favor of affirmance. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) We review compliance with the ICWA notice requirements under the harmless error

standard. (*In re E.W.* (2009) 170 Cal.App.4th 396, 402-403; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

Standing

Standing to challenge an ICWA notice is set forth in title 25 United States Code section 1914 and rule 5.486(a). A non-Indian parent has standing to challenge the ICWA notice. (*In re B.R.* (2009) 176 Cal.App.4th 773, 779; *In re Jonathon S.*, *supra*, 129 Cal.App.4th at p. 339.) Any challenge to the ICWA notice is not forfeited by failing to raise it in the juvenile court; ICWA notice may be challenged for the first time on appeal. (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 15.)

Analysis

Section 224.3, subdivision (a) requires that notice be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe. Courts have construed this language to require "notice to *all* federally recognized tribes within the general umbrella identified by the child's parents or relatives." (*In re O.C.* (2016) 5 Cal.App.5th 1173, 1183; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1202.) Notice is sufficient if there was substantial compliance with ICWA. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.)

There are eight federally recognized Apache tribes: Apache Tribe of Oklahoma; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation of New Mexico; Mescalero Apache Tribe of the Mescalero Reservation of New Mexico; San Carlos Apache Tribe of the San Carlos Reservation of Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation of Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation of Arizona. (82 Fed. Reg. 4915-02 (Jan. 17, 2017).) There are three federally recognized Cherokee tribes: Cherokee Nation of Oklahoma; Eastern Band of Cherokee Indians of North Carolina; and United Keetoowah Band of Cherokee Indians of Oklahoma. (*In re C.D.* (2003) 110 Cal.App.4th 214, 226.)

Mother contends notice to four tribes was deficient: the Apache Tribe of Oklahoma, the Jicarilla Apache Nation, the White Mountain Apache Tribe, and the United Keetoowah Band of Cherokee Indians. Any deficiency in an ICWA notice may be deemed harmless when, even if proper notice had been given, the child would not have been found to be an Indian child. (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Regardless of any challenge mother may have to the adequacy of the notice to the Apache Tribe of Oklahoma, that tribe received actual notice. The Apache Tribe of Oklahoma sent a written response stating the girls were not members of that tribe and not eligible for membership. Consequently, any alleged defect in the notice to the Apache Tribe of Oklahoma is harmless. (*In re D.N.*, *supra*, 218 Cal.App.4th at p. 1251.)

As for the notice sent to the Jicarilla Apache Nation, it appears this tribe received actual notice. The address for service of ICWA notice that is found on the Bureau of Indian Affairs website for the Jicarilla Apache Nation is to the tribe, attention of Regina Keeswood, ICWA social worker, P.O. Box 546, Dulce, New Mexico.[4] Although the notice was apparently sent to an incorrect post office box number for the ICWA agent for the Jicarilla Apache Nation, the notice was actually received by the tribe's ICWA agent for service of notice. The notice was mailed to Jicarilla Apache Social Services ICWA Department, P.O. Box 1520, Dulce, New Mexico. The return receipt shows an address of P.O. Box 1520, Dulce, New Mexico and is signed by "Gina Keeswood." Gina Keeswood is presumptively the Regina Keeswood named as the agent for service of ICWA notice.

Proof of actual receipt by the tribe's designated agent for service of ICWA notice shows that the tribe received actual notice of the dependency proceedings, despite an incorrect post office box number. Therefore, any defect in the notice is harmless. (*In re E.W.*, *supra*, 170 Cal.App.4th at pp. 402-403.)

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[4] https//www.bia.gov/bia/ois/dhs—ICWA Designated Tribal Agents for Service of Notice—Federal Register Notice, June 4, 2018; Southwest Region. All agents for service of ICWA notice are listed at this website, by region.

The White Mountain Apache Tribe were served with notice of the dependency proceedings by mailing notice to the tribe at P.O. Box 1870, Whiteriver, Arizona. !(CT 108)! The agent listed on the ICWA-030(A) form prepared by the department is not the agent specified on the BIA's website. The specified agent for the purposes of ICWA notice for the White Mountain Apache Tribe is Cora Hinton, not Mariella Dosela, as listed on the form.[5] However, the correct mailing address was used for the tribe and the notice was apparently sent to the correct agent. The return receipt reflects that the notice was mailed to the White Mountain Apache Tribe, at the correct address for notice, and to the attention of Cora Hinton, the ICWA agent for notice. Again, this tribe received actual notice apparently addressed to the proper agent for service of ICWA notice; thus, any alleged defect in notice is harmless. (*In re E.W., supra,* 170 Cal.App.4th at pp. 402-403.)

Finally, the United Keetoowah Band of Cherokee received actual notice of the dependency proceedings. The ICWA-030(A) form reflects that the notice to this tribe was sent to the correct address of P.O. Box 746, Tahlequah, Oklahoma; the agent's name is not specified on the form.[6] The return receipt, however, shows the notice was mailed to the attention of three people in the tribe, including Raven Owl, who is the designated person to whom ICWA notice is to be sent. Once again, any alleged defect in the notice is harmless. (*In re E.W., supra,* 170 Cal.App.4th at pp. 402-403.)

Rule 5.482(c)(1) provides in relevant part that if after ICWA notice has been provided, and if the tribe has not responded within 60 days of receipt of the notice, the juvenile court may determine that ICWA does not apply to the proceedings. Here, the ICWA notices were received by the tribes on various dates in February and early March.

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5 White Mountain Apache Tribe is part of the Southwest Region on the BIA website.

6 The United Keetoowah Band of Cherokee are part of the Eastern Oklahoma Region on the BIA website and show Raven Owl as the designated agent for service of ICWA notice.

Multiple tribes responded that the girls were not members or eligible for membership in the tribes. For those tribes that did not respond, more than 60 days after receipt of the ICWA notice had passed before the juvenile court found on July 3 that the ICWA did not apply.

Having concluded that any alleged defects in the ICWA notices were harmless, we conclude the juvenile court did not err when it found on July 3 that the ICWA was not applicable in this case.

DISPOSITION

The finding that the Indian Child Welfare Act does not apply to E.T. and N.T., and the June 28 and July 3, 2018 orders, are affirmed.